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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTWYNE LAMAR HARPER,

Defendant and Appellant.

F067218

(Super. Ct. No. BF139247C)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J., and Chittick, J.†

† Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Defendant Antwyne Lamar Harper pled no contest to being a felon in possession of a firearm (former Pen. Code, § 12021, subd. (a)(1))¹ and admitted a gang allegation (§ 186.22, subd. (b)(1)) in exchange for a five-year prison term. On appeal, he contends the trial court imposed an unauthorized sentence and violated ex post facto principles when it imposed a \$280 restitution fine pursuant to section 1202.4, subdivision (b). He asserts that the court intended to impose the minimum fine, which was \$200 at the time he committed the crime in 2011.² We disagree that the trial court clearly intended to impose the minimum fine, and we conclude defendant has forfeited his claim. Accordingly, we affirm.

DISCUSSION

“Under the United States Constitution, ““any statute ... which makes more burdensome the punishment for a crime, after its commission ... is prohibited as *ex post facto*.”” [Citations.] The ex post facto clause of the state Constitution is in accord.” (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31.) The prohibition against ex post facto laws applies to restitution fines, which constitute punishment. (*People v. Souza* (2012) 54 Cal.4th 90, 143.) An increase in the minimum restitution fine makes the authorized punishment more burdensome. (*People v. Saelee, supra*, at pp. 30-31.)

¹ All statutory references are to the Penal Code unless otherwise noted.

Section 12021, subdivision (a)(1) was repealed operative January 1, 2012 (Stats. 2010, ch. 711, § 4, p. 4036), and reenacted without substantive change as section 29800, subdivision (a)(1) (Stats. 2010, ch. 711, § 6, p. 4169).

² According to the felony amended information, defendant was alleged to have committed this offense sometime between November 19 and December 19, 2011. During that time period, section 1202.4 provided in pertinent part: “(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000)” (§ 1202.4, subd. (b)(1), as amended by Stats. 2011, ch. 45, § 1, p. 1830, eff. July 1, 2011.)

Therefore, a court cannot apply an increased minimum restitution fine retroactively to a defendant whose crime occurred prior to the increase in the minimum restitution fine.

But a defendant can forfeit an ex post facto claim by failing to raise the issue (see *People v. White* (1997) 55 Cal.App.4th 914, 917), particularly where any error could easily have been corrected if the issue had been raised at the sentencing hearing.

Generally, in the interests of fairness and judicial economy, only “claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]” (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*)). “‘It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.’ [Citations.]” (*People v. Earp* (1999) 20 Cal.4th 826, 882.)

Although it is true that the forfeiture rule does not apply when a trial court imposes an unauthorized sentence (*Scott, supra*, 9 Cal.4th at p. 354), the sentence in this case was not unauthorized. An unauthorized sentence is one that “could not lawfully be imposed under any circumstance in the particular case.” (*Ibid.*) Under the version of section 1202.4 in effect when defendant committed the crime, the trial court had the discretion to impose a fine in an amount between \$200 and \$10,000. Because the \$280 fine imposed fell within that range, the fine was authorized and the trial court had the discretion to impose it.

Defendant claims the trial court’s statements that the fines were standard fines it had to order show that it intended to impose the minimum restitution fine. At sentencing, the following occurred:

“[THE COURT:] Probation is denied and the defendant is sentenced to the Department of Corrections for the upper term of three years. That sentence [is] enhanced by two years on the enhancement for a total fixed term of five years.

“The weapon is to be confiscated and used or destroyed by the police department.

“The defendant must register under [section]186.30 of the Penal Code.

“\$40 under [section]1465.8, \$30 under [section]70373, \$280—

“THE DEFENDANT: All that is waived.

“THE COURT: Hold on a second. \$280 under [section]1202.4[, subdivision](b) and \$280 under [section]1202.45. But that fine is suspended subject to parole revocation proceedings.

“Credits are?

“PROBATION OFFICER: 485, plus 484, for a total of [9]69.

“THE COURT: That will be the order.

“THE DEFENDANT: Excuse me, your Honor.

“THE COURT: There is nothing else, [defendant].

“THE DEFENDANT: No, I’m just speaking about all the restitution and this. All that was waived.

“THE COURT: No, these are standard fines. I can’t even waive them. I have to order those fines and fees.

“THE DEFENDANT: Okay.

“THE COURT: I would never do that because I have to. All right?”

We disagree that this exchange demonstrates that the trial court intended to impose the minimum restitution fine. The trial court’s statements that the fines were standard and it had to impose them may simply have been an acknowledgement that it could not waive the fines as defendant requested. Because the record does not clearly demonstrate the court’s intent, we cannot assume the court intended to impose the minimum fine but was unaware that the applicable minimum fine was \$200. The court did not expressly state that it intended to impose the minimum fine, and we will not presume the court applied the wrong statutory law (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 [“It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties”].) The court may simply have been exercising its discretion to impose the fine it found appropriate.

Under these circumstances, it was incumbent upon defendant to object to the fine amount in the trial court and bring the alleged mistake to the court's attention. His failure to do so forfeits the claim on appeal. (*Scott, supra*, 9 Cal.4th at p. 353 [the forfeiture doctrine "should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices"].)

DISPOSITION

The judgment is affirmed.